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No. 94-286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
Petitioner,
v.
BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents do not dispute the clear present conflict between the Eleventh Circuit decision in this case and the decisions of at least the First, Third, and Tenth Circuits (as well as of various state courts) on the issue presented. *See* Br. in Opp. 12. Nor do they dispute the importance of this obviously recurring issue; indeed, their discussion of a host of recent cases confirms its importance. Br. in Opp. 14 & n.5. Respondents nevertheless suggest that this Court should deny certiorari based on the speculation that the circuit conflict will disappear on its own, as the First, Third, and Tenth Circuits (together with several state courts) *all* will repudiate their precedents on the

issue in light of a passage in this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992). Br. in Opp. 12-14. As the petition explains, however, and as respondents' own brief confirms, this speculation is so implausible that it offers no sound reason to decline review. And respondents' effort to defend the Eleventh Circuit's decision reinforces, rather than undermines, the argument for granting the petition.

1. Specifically, even if other circuits were to agree with the Eleventh Circuit that *Cipollone* announced a radical new preemption principle—excluding implied preemption in the face of certain express preemption provisions—that conclusion could not logically furnish a basis for abandonment of the express conclusion (in *Wood*, followed by *Kitts*) that any such principle of preemption law would not apply to the Safety Act.[1] By the same token, even if other circuits (and state courts) were to follow the Eleventh Circuit's lead in training their focus exclusively on the savings clause of the Safety Act, nothing in *Cipollone*, which involved no savings clause, could conceivably provide a ground for repudiating the explicit rulings of the First, Third, and Tenth Circuits that the savings clause does *not* preserve "common law actions that would subvert a federal statutory or regulatory scheme"[2]—a conclusion, directly contrary to the Eleventh Circuit's conclusion here, affirmed by decisions of this Court both before and after *Cipollone*. *See* Pet. 17-19. Thus, respondents' prediction that numerous other courts all would take the extraordinary step of overruling their precedents suffers from crucial logical flaws *even if* all of those courts were to adopt the Eleventh Circuit's reading of *Cipollone*.

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[1] *Wood v. General Motors Corp.*, 865 F.2d 395, 414 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990).

[2] *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1125 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990).

If respondents' logic fails to support their prediction of widespread overruling based on *Cipollone*, post-*Cipollone* experience affirmatively undermines the prediction. The evidence, not disputed by respondents, is that a number of federal district courts and state appellate courts have found preemption under the Safety Act since *Cipollone*. *See* Pet. 17; Br. in Opp. 13-14. Thus, respondents' prediction, which starts off as mere speculation, not only is unsupported by their reasoning; the evidence is positively against it.

2. Respondents' actual discussion of *Cipollone* and the substance of the Eleventh Circuit's reasoning does the very opposite of bolstering their prediction of widespread overruling of precedents. To the contrary, the discussion strongly confirms how forlorn and implausible is their hope that numerous other courts will all reverse course and come into line with the Eleventh Circuit's ruling here. In several ways, respondents' discussion powerfully reinforces the need for this Court's review.

First, respondents insist that "the court of appeals' decision is based on the *Cipollone* rule that the existence of express preemption provisions precludes implied preemption." Br. in Opp. 12; *see id.* at 9 (Eleventh Circuit held that *Cipollone* directs "that the existence of an express preemption provision precludes implied preemption analysis"). But that reading of *Cipollone* has already been squarely rejected by the D.C. Circuit—in a decision completely ignored by respondents. *Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 581 n.12 (D.C. Cir. 1994) ("We do not read *Cipollone* to stand for the proposition that the enumeration of preempted areas in a statute forecloses altogether the possibility that state statutes in actual conflict can be preempted. . . . Where a state statute actually frustrates the purposes of Congress, we do not believe that the specific preemption clauses in a statute alone provide a 'reliable indicium of congressional intent with respect to state authority.'"

(quoting *Cipollone*)). The circuit conflict thus goes beyond even the First, Third, and Tenth Circuits.

Second, respondents specifically defend the Eleventh Circuit's analysis of the Safety Act based on the conclusion that "[t]he preemption clause in the Safety Act is silent as to common law claims" because the clause uses the phrase "safety standard." Br. in Opp. 17-18. But that conclusion is so patently erroneous under this Court's decisions in *Cipollone* itself as well as *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (199?), that it could not possibly be the basis for a turnaround by other circuits on the Safety Act. *See* Pet. 10 & n.3. And this conclusion, like the reading of *Cipollone* underlying the Eleventh Circuit's decision, is also flatly inconsistent with the clear law in many other circuits. *See* Pet. 16 n.4 (citing cases); Brief *Amicus Curiae* for American Trucking Ass'ns at 12-14 (citing cases). Again, the circuit conflicts presented by this case are wider even than the ones respondents concede.

Third, and perhaps most revealingly, even respondents cannot bring themselves to endorse the Eleventh Circuit's reading of *Cipollone*, but are forced to acknowledge that *Cipollone* cannot sensibly be read to establish unqualifiedly the very proposition on which the Eleventh Circuit rested its decision. Recognizing that the Eleventh Circuit's preemption principle is vulnerable to this Court's longstanding line of precedent applying conflict preemption standards even to statutes containing broad savings clauses —precedent as old as *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), and as fresh as *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993)—respondents understandably start backing away from the Eleventh Circuit's (and, initially, respondents' own) proposition that implied preemption is precluded by an express preemption provision like that contained in the Safety Act. Instead, respondents repeatedly assert that a "direct, irreconcilable conflict" may yet support a finding of pre-

emption, notwithstanding an express preemption provision that does not reach the situation. Br. in Opp. 16, 23. But that acknowledgement utterly destroys the whole legal theory on which the decision below rests—as well as any remaining basis for respondents' prediction that widespread circuit-court overturning of precedents will occur based on acceptance of the Eleventh Circuit's reading of *Cipollone*, which respondents themselves now treat as not quite defensible. In short, respondents' own substantive discussion of preemption law confirms the several reasons set forth in the petition (which we will not repeat here) for rejecting the claim that *Cipollone* meant to revolutionize preemption law in the way the Eleventh Circuit held.

3. Respondents also cannot defend the Eleventh Circuit ruling by suggesting that there is no "conflict" between federal and state law in this case. *See* Br. in Opp. 21-27. The Eleventh Circuit, of course, readily acknowledged that a conflict exists here (for Standard 121) in precisely the same way as a conflict existed in the First, Third, and Tenth Circuit cases finding preemption (for Standard 208): "in both cases a safety standard established under the [Safety] Act effectively gave the manufacturers the option of not installing the device" that plaintiffs asked state common law to require (Pet. App. 10a). It was precisely because the Eleventh Circuit acknowledged this conflict, in the ordinary "conflict preemption" sense, that it found it necessary to overturn its prior precedent in order to reject preemption.

Similarly, respondents are simply wrong when they say that the *Paccar* decision, which forced NHTSA to create the Standard 121 option for trucks, "was not based on a finding that the antilock requirement was unsafe." Br. in Opp. 6 (discussing *Paccar, Inc. v. NHTSA*, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978)). As the petition shows (Pet. 7), the *Paccar* court required the revision precisely because of "a potentially more hazardous highway situation" with the requirement

than without; it was thus explicitly the "possibility of greater danger to the public" that caused the adoption of the Standard 121 option (as with the air bags option contained in Standard 208). *Paccar,* 573 F.2d at 643. Respondents' statement to the contrary is incomprehensible.

With this misstatement of *Paccar* and the impact of Standard 121 out of the way, it is obvious why the various decisions respondents urge upon this Court (Br. in Opp. 11-12) are inapposite here. Those decisions decline to find preemption based on mere compliance with those federal safety standards that set only minimum requirements. Standard 121, however, like the Standard 208 at issue in the First, Third, and Tenth Circuit cases repudiated by the Eleventh Circuit here, does *not* just set minimum standards, but grants an option to truck manufacturers for reasons of safety and practicability, as the Eleventh Circuit recognized (Pet. App. 10a). This Court should resolve the clear conflict over whether federal law preempts state common-law determinations that take away the federally granted option.

CONCLUSION

For those reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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